STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

XO Illinois, Inc.	)	
	)	
vs.	)	**ICC Docket No. 01-0843**
	)	
AT&T Communications of Illinois, Inc. and AT&T Corporation.	)	
	)	
In the Matter of a Complaint Pursuant to 220 ILCS 5/13-515	)	

AT&T's MOTION TO DISMISS

AT&T Communications of Illinois, Inc. and AT&T Corp. (hereinafter collectively "AT&T") hereby move to dismiss the Complaint of XO Illinois, Inc. filed December 26, 2001 ("Complaint"). In its answer being filed separately, AT&T responds to the factual allegations of the Complaint. Without prejudice to the answer and defenses set forth therein, however, the Complaint should be dismissed because, accepting the allegations of the Complaint as true, it fails to state a claim upon which relief may be granted by this Commission. As discussed below, XO's Complaint is in substance a collection action, which is not contemplated under the Public Utilities Act (PUA), and it should be dismissed as a matter of law.

I. Count One of XO's Complaint Fails To State A Claim Upon Which Relief Can Be Granted By The Commission

Count One of the Complaint contains allegations against AT&T for nonpayment of access charges and 800 database query charges invoiced by XO under its tariffs. XO states: "By failing to pay the full amount invoiced in XO's bills, AT&T is in breach of its obligations under the tariffs and in violation of the laws and regulations of the state of

Illinois." Complaint, ¶ 13. The Complaint fails, however, to cite any "laws and regulations" that support the relief (payment of monies) that XO seeks from AT&T.

XO cites to "Sections 9-101 et seq." as the substantive basis for jurisdiction in Count One. Complaint, ¶ 14. This is no more than a generic reference to Article IX of the PUA. Yet the entirety of Article IX does not apply to carriers that provide only competitive services.[1] Section 13-101 expressly limits the applicability of Article IX with respect to telecommunications generally and competitive telecommunications in particular to certain enumerated provisions; XO has not alleged that any of the preserved provisions of Article IX support Commission jurisdiction here. Moreover, the most expansive reading of the limited portions of Article IX that remain applicable to competitive telecommunications carriers does not support XO's action. Those provisions impose obligations *on carriers* with respect to *the carriers'* (here, XO's) rates and charges. Specifically, Section 9-250 provides a remedy against a carrier for charges that are unjust and unreasonable, and Section 9-252.1 provides for refunds by the carrier for overcharges. None of these provisions support a claim by the carrier for collection of monies alleged to be owed to the carrier for tariffed services. In short, nothing in the PUA provides for the enforcement of payment obligations or liabilities by carriers against customers – end users or other carriers – or places such authority with the Commission.[2]

If XO's position were valid, one would expect to have seen cases brought before the Commission by utilities against customers for nonpayment of charges. We are aware

[1] As XO admits in ¶ 2 of the Complaint, it is a competitive local exchange carrier, which necessarily means that its intrastate tariffed services are all classified as "competitive." Similarly, AT&T only provides services in Illinois that are classified as competitive.

[2] It is well settled that the Commission's jurisdiction is limited to matters specified in the Public Utilities Act. Lowden v. Illinois Commerce Commission, 376 Ill. 225, 33 N.E.2d 430 (1941).

of no such actions ever having been entertained by the Commission. That observation only confirms the conclusion that there is no authority under Article IX or elsewhere in the PUA that entitles a carrier to bring what amounts to a collection action against another carrier before the Commission.

In short, XO's attempt to cast what amounts to a collection action under Article IX is incorrect as a matter of law. Accordingly, Count One should be dismissed.

II. Count Two Fails To State A Claim Pursuant To Section 13-514 of the Public Utilities Act

As to Count Two, XO alleges that AT&T has violated Section 13-514(2) and 13-514(6) through non-payment of the charges described in Count One and thereby allegedly is impeding the development of competition. Complaint, ¶ 16. Specifically, XO cites Section 13-514(2), alleging that AT&T is "unreasonably impairing the speed, quality or efficiency of services used by another . . .carrier." Similarly, it asserts that AT&T is "unreasonably acting or failing to act in a manner that has a substantial adverse effect on the ability of another . . .carrier to provide service to its customers." Sec. 13-514(6).

First, as to Subsection 514(6), XO has utterly failed to assert any way whatsoever in which AT&T is claimed to have impaired the "speed, quality, or efficiency" of any services "used by another carrier." Thus, Subsection (2) cannot support relief. Similarly, XO does not even attempt to advance allegations to support the proposition that any action (or inaction) of AT&T has had any "substantial adverse effect" on XO's ability to provide service to its customers. Telling in this regard is XO's failure to invoke Subsection 214(e). That section provides that "[i]f the alleged violation has a substantial adverse effect on the ability of the complainant to provide service to customers, the

complainant may include in its complaint a request for an order for emergency relief." Presumably if XO had facts to support a "substantial adverse effect" claim, it would have attempted to employ this section to secure emergency relief. Its failure to do so amounts to a concession that it has no such factual basis, and in any event XO has alleged none.

XO attempts to generate a Section 514 claim by alleging that AT&T is "discriminating" against it because AT&T is not withholding access charges levied by ILECs and affiliated CLECs. But quite apart from the veracity of such allegations, nowhere does XO explain how its "discrimination" assertions enhance the substance of its complaint under Section 13-514 in any way. XO and AT&T are, by XO's own allegations, in a business dispute over its charges, and the fact that AT&T may be paying the legitimate access charges of other entities, whether affiliated or unaffiliated, is of no consequence. In short, XO's discrimination theory in no way cures its failure to allege any facts in support of a claim of a substantial adverse effect on competition.

Accordingly, Count Two should also be dismissed. Further, AT&T would point out that the expedited procedures set forth in Section 13-515 apply by the terms of that section only to complaints properly brought under Section 13-514; accordingly, if and to the extent this motion is granted with respect to Count Two but any portion of the Complaint survives the motion to dismiss, the Administrative Law Judge should rule that any further proceedings should not be conducted pursuant to the expedited relief provisions of Section 13-515.

Conclusion

WHEREFORE, for the foregoing reasons, AT&T respectfully moves for dismissal of the Complaint of XO Illinois filed December 26, 2001 in this docket.

Respectfully submitted,

By: _____

Cheryl Urbanski Hamill
Douglas W. Trabaris
AT&T Law Department
222 West Adams Street - Suite 1500
Chicago, IL 60606
(312) 230-2665
(312) 230-8211 (facsimile)
chamill@att.com
dtrabaris@lga.att.com

Dated: January 4, 2002